

1967

Phil L. Hansen, Attorney General of the State of Utah v. Legal Services Committee of the Utah State Legislature : Brief of Respondent

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

PHIL L. HANSEN, Attorney General
of the State of Utah,

Plaintiff,

LEGAL SERVICES CENTER
OF THE UTAH STATE BAR
TURB,

Defendant.

WRIT OF HABEAS CORPUS

Appeal from the District Court
First Court for Salt Lake County

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IN THE SUPREME COURT OF THE STATE OF UTAH

PHIL L. HANSEN, Attorney General
of the State of Utah,

Plaintiff-Appellant

vs.

LEGAL SERVICES COMMITTEE
OF THE UTAH STATE LEGISLA-
TURE,

Defendant-Respondent.

Case No.
10784

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant has appealed from a decision of the District Court of the Third Judicial District, ruling that Senate Bill No. 4, enacted by the 36th Utah State Legislature is constitutional and does not infringe upon the constitutional duties of the Attorney General.

DISPOSITION IN THE LOWER COURT

The Appellant filed suit in the District Court of the Third Judicial District on June 24, 1966, challenging the constitutionality of Senate Bill No. 4 as enacted by the 36th Utah Legislature, 2nd Special Session which established the Joint Legal Services Committee and legal advisor for the legislature of the State of Utah. A motion to dismiss was filed by the Respondents and on the 4th day of November, 1966, an order was entered by the Honorable Bryant H. Croft, Judge, granting the Respondent's motion to dismiss and determining that the contentions of the Attorney General as to the constitutionality of the legislation were without merit.

RELIEF SOUGHT ON APPEAL

The Respondents submit that the decision of the District Court should be affirmed.

STATEMENT OF FACTS

The Respondents agree with the statement of facts as set forth in the Appellant's brief.

ARGUMENT

POINT I

SENATE BILL NO. 4, LAWS OF UTAH 1966,
CHAPTER 7 IS A VALID STATUTE AND DOES

NOT EXCEED THE AUTHORITY OF THE LEGISLATURE OF THE STATE OF UTAH IN PROVIDING FOR A LEGAL ADVISOR OF THE LEGISLATURE.

(A) SEPARATION OF POWERS

We cannot agree with Appellant that the principle of separation of powers was not part of the basis for the decision of the trial court.

In construing the constitutional duties of the Attorney General it is important to consider the provisions of Article V, Section 1 of the Utah Constitution which provides:

The powers of the government of the state of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The Attorney General claims that by acting as the sole and exclusive legal advisor to the legislature he would not be exercising any legislative function in contravention of this provision. It is true that he would not have a vote upon bills presented to the legislature. However, if the legislature is forbidden from looking to anyone but the Attorney General for the services set forth in Senate Bill 4, to be rendered by the legal advisor, then the Attorney

General becomes the *only* source for the skilled help needed in the preparation of bills or legislative measures and such power would allow the Attorney General to control the activities of the legislature either by failure to provide the help necessary or by the drafting of measures to suit the purposes of the executive branch of government rather than complying with the desires of the legislature. This is especially true where the legislature is limited to short, infrequent sessions as is the case in Utah.

The Attorney General's position that he and he alone can act as legal advisor for the legislature, fails to find basis in history since the legislature of the state of Utah has for many years hired reference attorneys, in no way associated with the Attorney General, during sessions of the legislature to perform advisory legal services. Senate Bill 4 would extend the period in which these services are performed beyond the limit of the regular sessions. The increasing workload of the legislative branch together with complexities with which it must deal now requires aid in drafting bills and rendering advice more often than just during the infrequent sessions of the Utah legislature.

In our system of government where the various branches are independent, certain checks and balances have been provided to maintain the proper relationship among those departments.

The proper influence of the executive department over legislative enactments is maintained through gubernatorial messages to the legislature

and the device of the Governor's veto. No worthwhile purpose could be served by making the Attorney General the only legal advisor available to both houses of the legislature and the Governor.

B. ARTICLE VII, SECTION 18.

The principal issue involved in this case is the meaning of Article VII, Section 18 of the Utah Constitution and specifically who are the "state officers" referred to therein. The Attorney General points to Article XXIV, Section 12 and claims that state officers are enumerated therein. That section listed certain state officers which were to be voted for at the time of the adoption of the constitution and included the elected state executive officers together with members of the state legislature, the judiciary and a Representative to Congress. It is apparent that the purpose of this section was not to define "state officers", but was a provision for the election of certain members of each branch of government so that the government might be organized and have sufficient personnel to begin functioning. Section 15 of that Article then would allow the legislature to provide "for the election of all officers whose election is not provided for elsewhere in this constitution. . . ." Certainly the word "officers" in these sections is being used as a very general term referring to any elected person. In this respect we can hardly feel that the Attorney General holds himself out as the exclusive legal advisor for the state officer therein called the Representative to Congress and that article

XXIV, Section 12 is, therefore, not an appropriate guide to the extent of the Attorney General's power.

One of the best and most recent cases in which a Supreme Court of a sister state has dealt with a similar problem is the case of *State v. Yelle* (Wash.) 239 P.2d 841.

Therein the Court stated "the meaning of the term 'state officer', as used in the constitution may vary according to the context in which it is used."

The provision in that state's constitution dealing with the duties of Attorney General, is identical with Article VII, section 18 of the Utah Constitution. The Court concluded that the Attorney General is the legal advisor only to the *elected state officers* named in Article III section 1 of the Washington Constitution which provision is substantially identical with Article VII, section 1 of the Utah Constitution and defines the *executive officers* of the state:

Washington Constitution Article III Sec. 1:

The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state * * *.

Utah Constitution Article VII Sec. 1:

The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, and Attorney General, each of whom shall hold his office for four years . . .

The Washington Supreme Court in that case further concluded that the Attorney General was not the sole legal adviser even of other members of the executive branch who were appointed by the Governor. The Court in the instant case need not determine whether there are persons within the executive branch who may seek legal counsel outside the office of the Attorney General but certainly the reasoning of the Washington Court that the word "officers" may have different meanings within the constitution, depending on the context, is sound, as is its conclusion that the Attorney General is advisor to executive officers only. In this respect it is both interesting and significant that the word officer does not once appear in Article VI of our Constitution entitled Legislative Department, and members of the legislature are never referred to in that article as state officers.

Numerous other cases have been before the courts to determine the authority of various boards, agencies or officers of the executive branch of government to hire attorneys other than the Attorney General. (See annotation in 137 ALR at page 818). No case has been found in which the Attorney General of any state has claimed to be the sole legal advisor to a state legislature and its members. Notwithstanding the fact that there are a great number of states in which the legislature hires attorneys¹ and has legal advisors and the practice in Utah

1. For examples of practices in other states see: Nevada. Nevada revised statutes 218.620, 218.690, 218.695, 218.697.

California. Government code sections 10200-10246.

where for many years the legislature has hired reference attorneys to advise and assist it during the sessions. This appears to be the first time that any attorney general in any state considered the legislature without authority to seek legal advice other than his.

That the drafters of the Utah Constitution did not feel that the Attorney General was to be the exclusive attorney and legal advisor for everyone connected with state government is evident because in Article VIII, Section 10, the legislature is given authority to provide for "other attorneys for the state".

The first Utah State Legislature enacted the following statute setting forth the duties of the Attorney General:

6. To give his opinion in writing and without fee to the legislature or either house thereof and to any state officer, board or commission, when required, upon any question of law relating to their respective offices. (Revised statutes 1898, Section 2438)

The legislative language appears to recognize the need for legislation to extend the services of the Attorney General to the legislature as well as to *state officers*. It is elementary that duties given by statute may be withdrawn, altered or supplemented by subsequent legislative enactments such as is done by Senate Bill 4, hereunder review.

Statements of the duties of attorneys general in American Law Texts, follow the above-stated

concept that the Attorney General is the legal advisor of the Executive branch of Government.

7 Am Jur 2d Page 8, Attorney General Section 8, states:

One of the most important duties of an attorney general having its inception in the origin of the office or statutes declaratory thereof is that of advising the executive and administrative heads of government.

7 CJS 1222, Section 5, states:

Duties of the Attorney General pertain to the Executive or Administrative Branch of the Government and since the functions of the Executive, Legislative and Judicial departments must be exercised separately by the appropriate division of government, the Attorney General cannot exercise any power or possess any function essentially judicial in nature.

No reference is found stating that the Attorney General is the sole legal adviser of the legislature.

C. THERE HAS BEEN NO INTERFERENCE WITH THE CONSTITUTIONAL DUTIES OF THE ATTORNEY GENERAL.

It is well settled law in this state and needs no citation that there is a presumption in favor of constitutionality and that all doubts will be resolved in favor of constitutionality, thus any doubt as to whether or not the legislature is usurping the

constitutional powers and duties of the Attorney General by the provisions of Senate Bill 4 must be resolved in favor of the legislature's act. It appears clear that the Attorney General was not intended to be the sole legal adviser to the legislature, and any doubts which may arise should be resolved in favor of the constitutionality of Senate Bill 4.

It is also well settled law in Utah as elsewhere that the legislature is the residuum of governmental power and that the constitution operates only as a limitation on that power to the extent that the legislature can do anything not specifically prohibited by said constitution. (See *Wood v. Bridge*, 13 Utah 2d 359, 374 P2d 516 and *Kimball v. Grantsville City*, 19 Utah 368, 51 Pac. 1.

CONCLUSION

State officers as used in Article VII, Section 18 of the Utah Constitution refers only to officers of the executive branch of state government and in no way operates to preclude the legislature from hiring a legal advisor to aid it in the preparation of bills and in performing other advisory duties. This Court should affirm the decision of the trial court.

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